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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

UNITED STATES RAILROAD RETIREMENT BOARD,

Appellant,

v.

GERHARD H. FRITZ, on his own behalf and on behalf of all those similarly situated,

Appellee.

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY, AMICUS CURIAE

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May 21, 1980

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Interest of the Amicus

Legal Services for the Elderly is funded by the Office of Economic Opportunity to provide assistance on research and litigation to poverty lawyers dealing with the problems of the elderly. Statistics prepared by the Special Committee on Aging of the United States Senate indicate that about one-third of the more than 20 million persons aged 65 and older in the United States live in poverty; an additional one-tenth are on the poverty borderline. Legal Services for the Elderly has a continuing concern with questions involving the administration of public assistance programs which deny the needy elderly the assistance necessary to sustain life at some level of decency.

Legal Services for the Elderly has participated as co-counsel or amicus

in numerous cases before this Court involving the elderly, including Graham v. Richardson, 403 U.S. 365 (1971); Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 107 (1971); Ortwein v. Schwab, 410 U.S. 656, reh. den., 411 U.S. 922 (1973); F. D. Matthews, Sec. HEW v. Diaz, 426 U.S. 67 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975); and Foley v. Connelie, 435 U.S. 291 (1978).

All parties have consented to the filing of this amicus brief. Originals of the consents are annexed.

DECISION BELOW SHOULD BE AFFIRMED

The Railroad Retirement Act of 1974 distinguishes between two classes of railroad workers, allowing one class to receive all the benefits to which they had become entitled during their working lives, and depriving the other class of

the same benefits. The members of these classes do not differ in the length of time they had worked in the industry, but only in the timing of that employment. Both classes consist of workers who worked for the railroads for more than ten but less than twenty-five years. Those workers in the protected class, however, were currently affiliated with the railroad industry when the Act was passed, or had been affiliated with it during the preceeding year, while those in the plaintiff class were no longer employed in the industry.

The distinction was made in an effort to remedy the financial difficulties of the Railroad Retirement System. One of the mandates of the Commission on Railroad Retirement, created by Congress in 1970, had been to recommend methods of

accomplishing this objective. Having isolated the payment of dual benefits as a significant factor, the Commission determined that dual benefits should not be eliminated entirely, but should be phased out, so that those workers with vested benefits would continue to receive them. In fact, this was the only one of the Commission's recommendations which was not followed by the Joint Labor-Management Negotiating Committee who prepared the bill restructuring the Railroad Retirement System. That Committee, in order to fully eliminate the fund's deficit, removed the plaintiff class from those who would continue to receive dual benefits. The decision to do so was made specifically in order to eliminate the 3% deficit which had been created by an increase in benefits

granted to the union.

The Committee's justification for distinguishing between the two classes was that the plaintiff class had "a lesser equitable claim than those who have remained with the railroad industry." HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H.R. 15301, 93d Cong., 2d Sess., at 168 (1974). However, as plaintiffs explain in their Motion to Affirm, "they were selected, as a class, for disparate treatment, despite having the identical nexus of eligibility to the benefit programs as do the members of the protected class....apparently because of their political unpopularity and powerlessness among those undertaking the selection." Motion to Affirm at 18. The crucial factor seems to have been that members of the plaintiff class

were in a position of even greater helplessness than other persons who had retired from the industry. Not only were they retired, so that their needs were of less concern to the union than those of the current workers, but also they had left the industry to work elsewhere. (as the District Court's Findings of Fact indicate, many of them were forced to leave the industry because of the constant reduction in the numberof workers needed.)

The special vulnerability of the members of the plaintiff class is typical of that shared by all elderly people. Not organized as a group, they are without a voice to press for help with their special needs. Retired from their jobs, no longer receiving a salary, they must depend on their pensions and Social Security payments

for support. As their affidavits make clear, the members of the plaintiff class had made large contributions toward their pensions as well as to social security. Having fully expected to have a fixed income of a certain amount to live on after retirement, they suddenly found themselves with a greatly reduced income. They were thus cast into an even more difficult position than most of the elderly, all of whom must live on a fixed income in times of high inflation. All of this is clearly documented in the District Court's Findings of Fact:

> 66. Plaintiff's certified class are all fixed-income elderly people whose productive, income-earning years are now behind them. These fixed-income retirees cannot now relive their earnings years.

> 67. The entire class of persons injured by the classification...lost approximately $88 per month per person as a result...
>
> ...
>
> 69. Class members have been forced to alter substantially their mode of retirement living due to the drastic reduction of Railroad Retirement benefits worked by the 1974 Act. FINDINGS OF FACT AND CONCLUSIONS OF LAW, p. 18.

These retired people's economic needs are greater than those of workers still in the labor force, and yet, because of their position of powerlessness, their interests are not as assiduously represented as are those of people who are still employed in the industry. The remarks of the head of the union, quoted in the Motion to Affirm at 36, typify the attitude to the plaintiff class: "We were vitally

concerned about our members,...but in order to make the fund solvent, we had to sacrifice somebody." The lack of concern for the retired workers is further exemplified by the failure of anyone involved to inform them of the impending reduction in benefits. As documented in the Findings of Fact of the District Court, class members were not notified of the possible reduction while Congress was working on the Act, nor were they invited to participate in the hearings. (Findings of Fact Nos. 46 and 51).

Appellants attempt to justify the exclusion of the plaintiff class on the basis that "Congress could...rationally conclude that individuals who remained employed by a railroad have in general demonstrated a greater commitment to or

affinity for the industry for which Congress designed the special statutory retirement program." Brief for the Appellant at 30. However as appellee's brief points out, "[t]he available evidence suggests that most of the appellee's class left because the declining railroad industry forced them out." Motion to Affirm at 19. The members of this class are, then, even more vulnerable than most elderly people. Because of an economic situation beyond their own control they had to leave the line of employment in which they had expected to spend their lives. Now that industry wants to deny them the benefits to which they became entitled while they were working. A more vicious ex post facto denial of benefits and expectations could not be imagined.

CONCLUSION

Decision below should be affirmed.

Respectfully submitted,

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